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IN THE

Supreme Court of the United States

OCTOBER TERM, 1966

No. 636

JACK WARNER, *Petitioner*

vs.

COMMONWEALTH OF PENNSYLVANIA,
Respondent

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF PENNSYLVANIA E.D.

JOSEPH SMITH
Attorney for Petitioner
1144 Fidelity Building
Philadelphia, Pa. 19109

Of Counsel:
JOHN W. DEAN, III
407 E. Lincoln Highway
Langhorne, Pennsylvania 19047

THE LEGAL INTELLIGENCER, 10 S. 37TH ST., PHILA. 19104

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IN THE

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No. .....

JACK WARNER, *Petitioner*

vs.

COMMONWEALTH OF PENNSYLVANIA, *Respondent*

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF PENNSYLVANIA

To the Honorable, the Chief Justice and the Associate Justices of the Supreme Court of the United States:

Your Petitioner, Jack Warner, respectfully prays that a Writ of Certiorari issue to review the per curiam order of the Supreme Court of Pennsylvania entered May 3, 1967, denying the appeal from the judgment of the Superior Court of Pennsylvania filed on December 16, 1966, affirming the judgment of sentence of the Court of Quarter Sessions of Bucks County entered September 3, 1965. By a per curiam order entered June 23, 1967, the Supreme Court of Pennsylvania denied a Petition for reconsideration thereof.

OPINIONS BELOW

The opinion of the Bucks County Court of Quarter Sessions (App., Vol. II pp. 111) is reported in 15 Bucks Co. Law Rep. 254. The opinion and dissenting opinion of the Superior Court of Pennsylvania (App., Vol. II pp. 131) is reported in 209 Pa. Sup. 215. The per curiam order of the Supreme Court refusing to allow an appeal from the judgment of the Superior Court of Pennsylvania (App., Vol. III pp. 5) is not reported. The per curiam order of the Supreme Court of Pennsylvania denying the Petition for reconsideration thereof (App., Vol. II pp. 26) is not reported.

JURISDICTION

1. The per curiam order of the Supreme Court of Pennsylvania refusing to allow an appeal from the judgment of the Superior Court was filed on May 3, 1967, and a timely Petition for Reconsideration thereof filed May 18, 1967, was denied on June 23, 1967, the date of the judgment sought to be reviewed. This Petition for Certiorari is filed within ninety days of the denial of the Petition for Reconsideration.

2. The jurisdiction of your Honorable Court is invoked under the provisions of 28 U.S.C., Sec. 1257 (3).

QUESTION PRESENTED

Was the trial court's refusal to grant Petitioner a continuance for a reasonable length of time to procure funds to enable him to engage counsel of his own choice, who had represented him at the first trial, a denial of his rights guaranteed by the Sixth Amendment to the Constitution of the United States as embodied in the Fourteenth Amendment?

CONSTITUTIONAL PROVISIONS INVOLVED

Constitution of the United States

AMENDMENT VI

"In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation, to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense."

Constitution of the United States

AMENDMENT XIV

"All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges and immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

STATEMENT

Petitioner was charged with conspiracy, receiving stolen goods and being an accessory before and after the fact.

At Petitioner's first trial in the Quarter Sessions Court of Bucks County which lasted from June 1 to June 5, 1964, and required a record of seven hundred pages, the jury,

after a lengthy deliberation, failed to agree upon a verdict and was discharged. At that trial Petitioner was represented by William Goldman, Esquire, counsel of his choice. The case was listed for retrial September 28, 1964, at which time Petitioner appeared without counsel and requested a continuance until November 10, 1964, stating he would then be in a position to pay Mr. Goldman the balance due for his services at the first trial and the retainer requested for the second trial. (Hearing September 28, 1964, p. 3.) At the insistence of the District Attorney the court refused to grant the continuance requested and advised Petitioner the case would again be listed for trial in October. (Hearing September 28, 1964, pp. 4 and 5.) The case was then listed for trial October 26, 1964.

On October 19, 1964, a hearing was held pursuant to a Petition filed by the District Attorney requesting that counsel be appointed for Petitioner. There were present the District Attorney, the defendant and Robert L. Yaroschuk, a member of the Bucks County Bar who had been practicing for a period of five years. At the hearing Petitioner again advised the court that he desired to retain Mr. Goldman who had represented him at the first trial and stated he would be in a position to pay him in full on or about November 10, the date of the continuance originally requested by him at the hearing on September 28, 1967. (Hearing October 19, 196 , p. 2.) The court then summoned Mr. Goldman to the hearing and in answer to the court's query as to what his attitude would be toward being appointed to represent Petitioner (Hearing October 19, 1964, p. 7), replied that it was a complicated case which required a lot of preparation; that in view of the many cases he had listed for trial the following week, even if he were appointed he could not "do justice to Mr. Warner even though I have past knowledge of the case." (Hearing October 19, 1964, pp. 8 and 9.)

The court then refused to grant the requested continuance, appointed Robert L. Yaroschuk to represent the

defendant and directed that the case be tried on the date originally fixed, to wit: October 26, 1964.

Thereafter on said October 26, 1964, Petitioner appeared in court with his court-appointed counsel, Mr. Yaroschuk, who requested a continuance for one month to enable him to adequately prepare the case for trial, stating, "Since my appointment, I have gone through the notes of testimony, consulted with my client, interviewed witnesses, and I feel that, as of right now, I am not able to competently represent Mr. Warner in a case of this complexity." (N. T. 2.) In answer to the court's query as to why he had not consulted with Petitioner in preparation for trial until Saturday, October 24, 1964, although he had been appointed October 19, 1964, Mr. Yaroschuk advised the Court that during that time Petitioner was still trying to arrive at a satisfactory arrangement with Mr. Goldman to represent him at the trial and that "even had Mr. Warner sat down with me [Mr. Yaroschuk] on the nineteenth of October, with the other business I have to take care of in my law practice, other than the preparation of Mr. Warner's case, I feel that if I had started considering it immediately, I still wouldn't be prepared to try it." (N. T. 2 and 3.)

The motion for continuance was promptly refused and the Petitioner compelled to proceed to trial.

On October 27, 1964, during the second day of the trial, Petitioner, fearing his case was not being properly presented, obtained permission to address the court and requested a continuance until some time after November 9, at which time he could retain Mr. Goldman, counsel of his choice, who was familiar with the case and could represent him properly and present it in the best interests of the defense. The court promptly denied the motion for continuance. (N. T. 255 and 256.)

On October 29, 1964, after a trial lasting over a period of four days and requiring a record of 625 pages, the jury returned a verdict of guilty on all three charges.

On July 1, 1965, motions for a new trial and in arrest of judgment were denied and on September 3, 1965, Petitioner was sentenced to a term of imprisonment for one to two years for conspiracy, six months to two years for receiving stolen goods, to run consecutively, and four years probation for being an accessory before and after the fact, all to be served at the State Correctional Institution at Philadelphia; and in addition, defendant was ordered to make restitution.

REASONS FOR GRANTING THE WRIT

It is well settled that the Sixth Amendment is made obligatory on the State Courts by the Fourteenth Amendment and includes not only the right of an accused to the aid of counsel in a criminal prosecution, *Gideon v. Wainwright*, 372 U.S. 335 (1963), but also guarantees defendant a fair opportunity and reasonable time to employ counsel of his own choosing. *Crooker v. California*, 357 U.S. 433, 439 (1958).

In *United States v. Johnston*, 318 F. 2d 288, 291 (C.A. 6th Cir. 1963), counsel of defendant's choice on the date of trial was excused on the ground that he had an imperative commitment to prepare an important case in the Michigan Supreme Court. He stated that his associate, Mr. Barris, was "thoroughly conversant" with the case and was prepared to proceed with the trial. The prosecuting attorney informed the court that the United States had gone to great expense to assemble witnesses from the United States and Canada. The court then, over defendant's objection, directed that the trial be held four days later. Defendant was convicted of all counts of the indictment after a four-day trial at which he was represented by Mr. Barris. In reversing the judgment of the District Court, Darr, J., said that although the United States had gone to great expense in assembling witnesses from long distances, that defend-

ant's interests were adequately protected by Mr. Barris and that he was, in fact, not prejudiced by the action of the District Court Judge, nevertheless "this situation does not satisfy appellant Balk's rights under the Sixth Amendment" and ruled that defendant "was deprived of a fair opportunity and reasonable time to select his own counsel."

In *United States v. Sherman*, United States Court of Appeals, 3rd Circuit, No. 15788 (App.,) not yet reported, defendant appealed from a conviction in the District Court on the ground that his "right to the benefit of counsel was unlawfully abridged." It appears that when the case was called for trial, counsel of his own choice was excused because of his engagement in another trial. The court then directed that the case be tried four days later at which time defendant, who was represented by a junior associate of retained counsel, was convicted of the offenses charged.

The judgment of the lower court was affirmed in a per curiam opinion filed January 30, 1967, on the ground that "the record discloses no motion for a continuance and no representation that retained counsel's associate could not adequately get ready over the weekend . . ."

"In all of the circumstances and particularly in the absence of any objection by counsel either to the substitution of his associate as counsel or to the trial date, we find no abridgement of the defendant's rights . . ."

Thus, it appears quite evident that had the same motions for continuance and representations as to lack of time to adequately prepare the case for trial been made in *United States v. Sherman, supra*, as were made on behalf of Petitioner, the Circuit Court of Appeals would undoubtedly have reversed the judgment of the District Court.

In *Ungar v. Sarafite*, 376 U. S. 575 (1964), Mr. Justice White said at page 589:

> "Contrariwise, a myopic insistence upon expeditiousness in the face of a justifiable request for delay can render the right to defend with counsel an empty

formality. *Chandler v. Fretag*, 348 U. S. 3. There are no mechanical tests for deciding when a denial of a continuance is so arbitrary as to violate due process. *The answer must be found in the circumstances present in every case, particularly in the reasons presented to the trial judge at the time the request is denied.*" (Italics supplied.)

It is respectfully submitted that the refusal of the lower court to extend the continuance requested by Petitioner for a period of only 15 days from October 26, the date fixed for trial, despite his assurance that he would then be able to secure and pay for counsel of his own choice who had represented him in the prior trial, effectively deprived him "of a fair opportunity and reasonable time to secure counsel of his choice" in violation of the Sixth Amendment to the Constitution of the United States.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the Petition for a Writ of Certiorari should be granted.

JOSEPH SMITH
Attorney for Petitioner

Of Counsel:
JOHN W. DEAN, III

APPENDIX

IN THE COURT OF QUARTER SESSIONS OF THE PEACE IN AND FOR THE COUNTY OF BUCKS

March Sessions, 1964 Nos. 140, 141 and 141A

COMMONWEALTH

v.

JACK WARNER

Receiving Stolen Goods, Conspiracy, Accessory Before the Fact, Accessory After the Fact

OPINION AND ORDER OF THE COURT

The defendant stands convicted of conspiracy, receiving stolen goods, and related charges in connection with the embezzlement and fraudulent conversion by an accomplice, John J. Byers, of approximately $72,000 from the Chelsea Title and Abstract Company of Pennsylvania, Inc., of which Byers was an officer. Of this amount, $20,000 was used by Byers to replace funds which he had previously embezzled from his account as real estate transfer tax agent for the Commonwealth of Pennsylvania; the balance of $52,000 was received by the defendant and used by him in his construction business.

In support of his motions for a new trial and in arrest of judgment, the defendant has advanced a large number of reasons embracing no less than seventy-five alleged errors in the course of the trial. This statistic is especially

noteworthy when we consider that the trial lasted only two and one-half days, of which only one and one-half days were devoted to the presentation of evidence. If even half of defendant's present contentions are meritorious, the trial of this case must have been a truly astonishing performance.

We have reviewed the record and have carefully considered each and every plaint now advanced, and have concluded that there is no substantial merit in any of them. It would serve no useful purpose to discuss each objection in detail in this opinion. All we can attempt to do is to discuss briefly some of the points seemingly stressed by counsel in his argument.

First, with respect to the selection of the jury: it was not error for the trial judge to refuse to permit counsel to explore the prospective jurors' opinions as to various principles of law; whether any of a prospective juror's employees handled money or were bonded by a bonding company; whether a prospective juror's husband was "a close associate" of a named individual in the FHA; and similar irrelevancies. It was not error for the trial judge to refuse to permit defense counsel to include in his questions to the prospective jurors the statement that the case had been tried previously and the previous jury had been unable to agree upon a verdict, or the suggestion that the jury's verdict in the present case would rest "solely on the testimony of an admitted conspirator". We believe the trial judge was correct in holding that the fact that a prospective juror's husband served as district attorney of Bucks County from 1954 to 1958 was not a sufficient basis for sustaining a challenge for cause; similarly, that the fact that a witness' husband serves as a court stenographer is not disqualifying.

A review of the factual background may prove helpful to a proper understanding of the remaining objections to be discussed. John J. Byers, Jr. was the assistant vice-president and one of the title officers of Chelsea Title and Abstract Company of Pennsylvania, Inc. The main office of the company was located in Trevose, Bucks County, and branch offices were located in Levittown and Doylestown as

well. Byers was in charge of the Doylestown office of the company, and also had general supervision of the force of title searchers who performed the necessary search work for all of the company's offices. Checks drawn on the escrow account of the title company required two signatures, and Byers was one of the authorized signatories. The home office would send Byers a supply of blank checks already bearing one authorized signature, for use in connection with the various real estate settlements held at the Doylestown office. Byers would fill in the checks as required, and then validate the checks by affixing his own signature.

The defendant Warner was a builder and real estate speculator. In the main, his business consisted of buying up old properties, remodeling them, and reselling. In addition, the defendant was apparently engaged to some extent in new construction of small apartment buildings.

During the period when the transactions generating this prosecution occurred, the defendant was involved in construction activities at several different locations, perhaps as many as eight or ten; but the precise capacity in which the defendant was involved does not appear. It is a reasonable inference from the evidence as a whole that the defendant needed money to finance the construction or remodeling of each of these properties; that he was responsible for various obligations in connection with the construction and remodeling; that he was instrumental in seeking commitments from lending institutions for permanent financing of the completed projects; and that he expected to make a profit on each of these various projects.

The defendant and Byers first became acquainted in the spring of 1962. The occasion of their first meeting is a matter of dispute, but it is generally agreed that they were business, rather than social, acquaintances; and that Byers was interested in obtaining for Chelsea the title insurance business involved in the defendant's real estate transactions.

In addition to his title insurance activities, Byers was an agent for the Commonwealth of Pennsylvania for the

sale of Pennsylvania realty tax stamps. About five years before meeting the defendant, Byers had begun embezzling funds from his tax stamp account and had apparently continued to engage in this practice. By February of 1963, he had embezzled approximately $55,000 from that source.

On June 15, 1962, a mortgage settlement was held at the Doylestown office of Chelsea Title, involving the placement of a permanent mortgage on one of the defendant's remodeled properties, located in Carversville. The proceeds of the permanent mortgage were insufficient to pay off all of the existing liens and charges against the property and furnish the defendant with the amount of money which he required. At the defendant's request, Byers agreed to ignore, or "by-pass", one of the existing liens, a mortgage held by one Barbara Walsh in the sum of approximately $1000, on the strength of the defendant's verbal assurance that he would promptly pay off the Walsh mortgage with his own funds.

On August 27, 1962, a similar situation arose with respect to the sale of a property in Quakertown. At the defendant's request, Byers overlooked a valid lien in the amount of approximately $600, on the strength of the defendant's assurance that the lien would be taken care of outside of the settlement.

At some point in 1962—the defendant says it was in October—Byers and the defendant had lunch at the Parkview Restaurant in Doylestown and discussed the possibility of the defendant giving to Chelsea all of his title insurance business: according to the defendant:

> ". . . what he actually said was, 'I am in a position to do things that no other title company can do.' I asked him what, and he said, 'I am in a position to skate'. I asked him, 'What do you mean?' He said, 'We are more liberal; we are more flexible; we are not stuffy like [other named title companies]'. I said 'What does that mean?' He said, 'We can advance you money'. Then he said, 'This can only be done in Doylestown' . . ." (N.T. pp. 370-371)

The defendant did not pay off the liens which Byers had "by-passed", and by March of 1963 these lien-holders were threatening foreclosure. After making several unsuccessful attempts to have the defendant pay off these obligations, Byers, on March 26, 1963, wrote a check on the Chelsea Title escrow account in the sum of $1082.89, and on April 1, 1963 another check on the same account in the sum of $600, to pay off these two liens. No corresponding deposits were made in the escrow account by the defendant or anyone else. On April 16 and April 18, 1963, Byers issued two checks aggregating $1360, to the Yardley Savings and Loan Association, to pay off certain installment payments due on mortgages of the defendant held by the association. On April 23, 1963, Byers gave the defendant a check in the sum of $1000 payable to the Bell Telephone Company, which was used by the defendant to pay off an overdue phone bill and prevent his business phones from being disconnected. On May 6, 1963, Byers issued another such check payable to the defendant in the sum of $1000, the face bearing the notation "partional proceeds check".

Meanwhile, on May 1, 1963, Byers had been advised that his agency for the sale of realty transfer tax stamps had been terminated and it was necessary for him to render a full and complete accounting. He was at that time, as mentioned above, approximately $55,000 in arrears. Byers asked the defendant to use his influence in attempting to have the agency restored, so that no accounting would be required. The defendant made a few inquiries but was unsuccessful in retaining the agency for Byers. A few days thereafter, Byers was notified that he must either produce the balance due or face arrest. According to Byers, he communicated this information to the defendant, and the defendant advised him to stay out of town the next day while he, the defendant, made further attempts to restore the agency to him. That evening, Byers telephoned the defendant, learned that nothing had been accomplished, and advised the defendant that he was approximately $20,000 short in the account, but that he had figured out a solution:

he would draw a check on the Chelsea settlement account to the order of the defendant, and have the defendant endorse the check back to him and use the funds to make up the deficit.

The following morning, May 9, 1963, a check in the sum of $20,000 drawn on the Chelsea account was in fact endorsed by the defendant to the order of John J. Byers, and was deposited by Byers in his tax account. In addition, without informing the defendant, Byers drew another check in the sum of $35,000, to the defendant's order, and forged the defendant's endorsement thereon. Byers' explanation of this forgery was that he had originally only informed the defendant that he was a couple of thousand dollars in arrears; that by the night of May 8 he had worked himself up to the point of being willing to admit that he was $20,000 in arrears; but that he had not been willing to admit the full extent of his embezzlements.

The defendant's explanation of this transaction was that on the evening of May 8, Byers telephoned him and asked to borrow a couple of thousand dollars, and in that connection asked the defendant to meet in Doylestown early the next morning. The defendant testified that he met Byers on the sidewalk across the street from the Chelsea office, and casually endorsed the check without reading it, in the belief that he was advancing to Byers the sum of $2000 from the funds which some day would be payable to the defendant out of real estate settlements.

On the same date (Byers says at the same time) Byers issued to the defendant a check on the Chelsea account in the sum of $1768, marked "on account of construction escrow item".

Thereafter, between May 16 and July 19, 1963, Byers issued to or for the defendant a total of twenty-seven additional checks on the Chelsea escrow account, aggregating an additional $45,000. Twenty of these twenty-seven checks were made payable to the defendant himself. Of these, thirteen bore the notation "construction advance", four bore the notation "portion of proceeds"; and two bore the nota-

tion "construction escrow". Four of the checks were payable to miscellaneous creditors of the defendant, and the balance were payable to the Yardley Savings and Loan Association in payment of the defendant's mortgage.

With the exception of two "legitimate" checks aggregating $1600, which represented valid disbursements of mortgage proceeds, and which have not been included in the foregoing narrative, no deposits of any kind were made in the escrow account of Chelsea Title, by the defendant or anyone else, to justify any of these disbursements. And, although the defendant professes to have regarded these transactions as merely carrying out a plan of temporary construction financing, no security for such advances was ever received by Chelsea, nor even any written evidence of indebtedness. Both Byers and the defendant claim that the defendant produced mortgage commitment letters in connection with each of the properties with which the defendant was involved, and that no advances were made except upon production of such commitment letters; nevertheless, it is also agreed that all such letters were retained by the defendant, and never were lodged in the Chelsea files. Moreover, no such letters were produced at the trial.

On July 23, 1963 Byers' superiors at Chelsea became aware of his misconduct. He signed a written confession and was promptly fired. Thereafter, Byers cooperated with Chelsea officials in reconstructing the records and clarifying the full extent of the shortage. He subsequently entered pleas of nolo contendere to charges of embezzlement and fraudulent conversion, testified against the defendant, and has since been sentenced.

The defendant signed judgment notes aggregating some $113,000 in favor of Chelsea Title and its bonding company, and in turn the defendant obtained judgment notes from Byers aggregating $50,000. The defendant actively assisted Byers in attempting to set up an agency for another title insurance company, and when this plan failed to materialize, the defendant employed Byers for several weeks in the defendant's construction business.

In view of the foregoing facts, which are largely undisputed, there is clearly no merit to the defendant's contention that the evidence is insufficient to support the verdict. If the jury accepted as true Byers' version of the $20,000 check transaction defendant's guilt as to two of the bills of indictment is clear. As to the remaining bill, involving the so-called "construction advances", the conclusion is inescapable that the defendant did receive the money and that he must have known that these were escrow funds. His own version of the luncheon conversation with Byers at the Parkview Restaurant would seem to establish his knowledge that these were not to be legitimate transactions. Whether the defendant in fact knew or should have known that these checks represented fraudulently converted funds was, on this record, a jury question.

Defendant's main contention in support of his motion in arrest of judgment relates to the charge of receiving stolen goods. It is argued that the defendant did not receive anything until the checks were cashed, and that there is no evidence that any of them were cashed in Bucks County. We reject this contention. A title company check, fully made out and properly signed, is certainly a thing of value. Byers had no right to deliver such check to the defendant, and his doing so amounted to fraudulent conversion or embezzlement. It is clear that most if not all of these checks were delivered to the defendant either at the Doylestown office of the Chelsea Title Company, or in the Bucks County Recorder of Deeds office. Accordingly, it was not error for the trial judge to overrule the defendant's demurrer to the evidence on the charge of receiving stolen goods; and for the same reasons, the motion in arrest of judgment must be refused.

Defendant complains of the trial judge's exclusion of proffered evidence to the effect that on one other occasion, the defendant had signed a check in blank and left it with an attorney with instructions to fill in the appropriate amount and deliver the check when the appropriate amount had been ascertained. This evidence was apparently offered in support

of defendant's contention that he endorsed the $20,000 check without looking at it. We believe the correctness of the trial judge's ruling is self-evident. Similarly, we see no error in excluding evidence as to the length of time that the defendant was interviewed by the district attorney, and that the defendant had offered to take a lie detector test. The correctness of the ruling on the latter point is further reenforced by the fact that, apparently, the offer related only to defendant's not having endorsed the $35,000 check, a matter which was no longer in dispute.

Defendant complains of the admission of hearsay evidence, when Byers was permitted to testify that attorneys for Mrs. Walsh had made written demand for payment of the mortgage which had been "by-passed". Under the circumstances, we believe the trial judge was correct in concluding this was not hearsay. The fact of such a demand was relevant to the issues in the present trial, irrespective of the accuracy of the factual basis for the notice. In any event, there was ample competent evidence that the Walsh mortgage had not in fact been paid, in the form of Byers' testimony as to conversations with the defendant.

We have reviewed the record with care and are unable to agree that the trial judge exhibited hostility toward the defense. The reference in the charge to the "obvious" criminality of Byers' conduct, in context, clearly did not mean it should have been obvious to the defendant. And we fail to understand defendant's argument that "evidence" is a stronger word than "testimony". We believe the defendant received a fair trial.

The remaining reasons have to do with the refusal of the defendant's requests for a continuance, and with the alleged lack of adequate opportunity for counsel, appointed by the court, to prepare for the trial. As noted above, the alleged crimes occurred during May, June and July of 1963. The defendant was arrested in September of 1963. He was represented by counsel of his own choosing. In May of 1964, the case was tried the first time, but the jury was unable to agree upon a verdict. Thereupon the jury was discharged

and the case was continued until September. On September 28, 1964, when the case was scheduled for retrial, the defendant appeared without counsel and requested a continuance. The defendant stated that he had been unable to obtain sufficient funds to pay the fee and expenses which his previous counsel insisted upon; but that he expected to be able to obtain the money by November 10. Although he had learned as early as September 10 that his prior counsel would not be willing to represent him unless the fee were paid, he made no attempt to request the court to appoint counsel for him. Defendant requested that the case be continued until November.

The court thereupon granted a continuance until the October session of criminal court, scheduled for the week of October 26, and emphatically and repeatedly explained to the defendant that, if it should appear that he would not be able to obtain the services of private counsel in time for the retrial, he should communicate with the court and suitable arrangements would be made to appoint competent counsel to represent him. It was emphasized that no further continuances would be granted under any circumstances, based upon the question of lack of counsel.

The defendant took no further action, but on October 19, 1964, the district attorney filed a petition setting forth that he had been advised that the defendant was not yet represented by counsel and requesting the court to appoint counsel to represent him. On that date, the court appointed Robert H. Yaroschuk, Esquire, to represent the defendant. The defendant was again advised that the case would be tried during the week of October 26, that if he wished to retain his prior counsel he had a right to do so, but that Mr. Yaroschuk was available to represent him and would need time in which to prepare for the trial. According to Mr. Yaroschuk, the defendant did not consult further with him until approximately 10:15 A. M. on Saturday, October 24, 1964; however, Mr. Yaroschuk had had an opportunity to review the transcript of the testimony of the first trial and thus to familiarize himself with the case.

In view of the recited facts, the refusal of any further continuances was obviously proper. As to the adequacy of counsel's preparation, while we greatly respect counsel's statement, at the outset of the trial, that he did not feel that he was adequately prepared; neverthless, for obvious reasons, we do not believe that such a statement in and of itself requires the granting of a further continuance; nor does it establish conclusively the inadequacy of representation. On the contrary, in the present case, counsel was much better prepared than the vast majority of privately retained counsel in criminal cases. By reason of his familiarity with the transcript of the prior trial, he was in the unusual position of knowing in advance exactly what each Commonwealth witness would say. He also had an opportunity to understand and evaluate the defense position. The record of the present trial makes it clear that Mr. Yaroschuk was well prepared for the present trial and conducted it well. His efforts on behalf of his client were untiring. We are satisfied that the defendant has absolutely no valid ground for complaint as to the quality of his representation.

To summarize, the case was well and fairly tried; the issues of guilt or innocence were for the jury and were properly submitted to that tribunal; and under the evidence, the verdict was clearly correct.

ORDER

AND NOW, this 1st day of July, 1965, for the reasons set forth in the foregoing opinion, defendant's motion in arrest of judgment and motion for a new trial are denied and refused.

By the Court,

JOHN P. FULLAM, *J.*

(Judge Beckert did not participate in the consideration or decision of this case.)

IN THE
SUPERIOR COURT OF PENNSYLVANIA

Nos. 764, 765, 766 October Term, 1965

COMMONWEALTH OF PENNSYLVANIA

v.

JACK WARNER, Appellant

Appeal from Judgment of Sentence of September 3, 1965 on Bills 140, 141 and 141a, March Sessions, 1964, Quarter Sessions, Bucks County.

Opinion by Hoffman, *J.*: Filed: December 16, 1966

Appellant, Jack Warner, was charged and convicted of receiving stolen goods, conspiracy and being an accessory before and after the fact. The charges arose in connection with the alleged embezzlement and fraudulent conversion of approximately $72,000 from the Chelsea Title and Abstract Company of Pennsylvania, Inc., [Chelsea Title] by John J. Byers, an officer of Chelsea Title. Of this amount $20,000 was used by Byers to replace funds which he had previously embezzled from his account as real estate transfer tax agent for the Commonwealth of Pennsylvania; the balance was received by appellant and used by him in his construction business. In light of the arguments presented on appeal, we do not feel it necessary to review in greater detail the facts in this case other than as they appear below.

I

Appellant contends that he was denied the effective assistance of counsel of his own choice because the court (1) refused short continuances despite appellant's assurances that with a little more time he could afford private counsel of

his own choice, and (2) appointed young and inexperienced counsel who had no prior knowledge of this case.

Appellant was arrested in September of 1963, and was represented by counsel of his own choosing. In May of 1964, the case was tried for the first time, but the jury was unable to agree upon a verdict. The jury was discharged, and the case was continued until September. On September 28, 1964, the date scheduled for re-trial, appellant appeared without counsel and requested a continuance. He stated that he had failed to amass sufficient funds to pay his attorney. It further appears that appellant knew as early as September 10, 1964, that his attorney would not represent him unless this fee were paid. Nonetheless, he requested that the case be continued until November 10, at which time he expected to have sufficient funds.

The court, thereupon, granted a continuance until the session of criminal court scheduled for October 21. The court explained to appellant, however, that if it should appear that he would be unable to obtain the services of private counsel by that date, he should communicate with the court and competent counsel would be appointed for him. The court also emphasized that no further continuances would be granted due to lack of counsel.

Appellant took no further action. On October 19, 1964, however, the district attorney filed a petition asserting that appellant was not yet represented by counsel and requesting that the court appoint counsel for him. On that date, the court appointed Robert H. Yaroschuk to represent appellant and again advised appellant that the case would be tried on October 26. It further advised him that he might retain his prior counsel, but that Mr. Yaroschuk would be available to represent him. Appellant was warned by the court that Mr. Yaroschuk would need time to prepare for trial. Nonetheless, appellant did not consult with Mr. Yaroschuk until approximately 10:15 a.m. on October 24, 1964, two days before the trial. Mr. Yaroschuk did have an opportunity to review the testimony in the first trial, however, and thus become familiar with the case.

It is within the discretion of the trial judge to grant or refuse a continuance, and his action will not be disturbed in the absence of a manifest abuse of discretion. *Commonwealth ex rel. Bronzell v. Myers*, 205 Pa. Superior Ct. 375, 378, 208 A. 2d 871, 873 (1965). In light of the above facts the trial court did not abuse its discretion in refusing to grant a second continuance. Appellant was well aware many weeks before the second trial that his own attorney might withdraw from the case. The court was prepared to appoint Mr. Yaroschuk who might begin to work on the case, even though the status of appellant's own attorney was still unclear. Every reasonable effort was made by the court to protect appellant's right to counsel. The duty did not devolve upon it, however, to continue appellant's case indefinitely until he might accumulate sufficient funds to pay an attorney of his own choosing.

In addition, we have made a close review of the whole trial record and can find no basis for appellant's contention that Mr. Yaroschuk was incompetent or insufficiently prepared. Moreover, any difficulties which Mr. Yaroschuk may have encountered in preparing for this case were undoubtedly due, in great measure, to appellant's reluctance to consult with him until two days before trial. "Having delayed in accepting that counsel, he cannot now complain of his own neglect." *Commonwealth ex rel. Bronzell v. Myers*, supra at p. 378.

The examples of Mr. Yaroschuk's alleged incompetence are without merit. We find that Mr. Yaroschuk expended great efforts on behalf of his client and was more than competent. We are satisfied that appellant has no valid ground for complaint as to the quality of his representation.

II

Appellant contends that he was denied a fair and impartial trial, because he was taken into custody by the police and held incommunicado for nine hours, while being denied his right to counsel, until he signed a statement involuntarily. Even if this be true—and there is nothing in the

record to substantiate it—no incriminating statement by appellant was offered into evidence by the Commonwealth or in any way entered into the jury's determination of guilt or innocence. Consequently, the alleged involuntary statement had no impact and could not have prejudiced appellant's position at trial. See *Commonwealth ex rel. Walls v. Maroney*, 416 Pa. 290, 294, 205 A. 2d 862, 865 (1965).

III

Appellant contends that there was adverse newspaper publicity which denied him a fair and impartial trial and a fair hearing before the grand jury. Appellant has presented neither newspaper clippings nor other evidence to substantiate this contention. Consequently, there is nothing on which we might base the conclusion urged upon us by appellant.

IV

Appellant contends that the trial judge abused his discretion by forcing appellant to use peremptory challenges to eliminate two jurors who should have been dismissed on voir dire for cause. The two prospective jurors were: 1) the wife of the court stenographer of Judge Satterthwaite, President Judge of the Orphans' Court of Bucks County; and 2) the wife of Mr. Donald W. Van Artsdalen who had been District Attorney of Bucks County for eight years, until 1958, six years prior to the trial.

We find no evidence in the record to justify appellant's contention. Both prospective jurors testified that they could decide this case solely on the basis of the facts set before them. Their contacts with the law enforcement agencies and criminal courts of Bucks County could be described, at best, as remote. Consequently, the judge did not abuse his discretion in deciding that these prospective jurors should not be dismissed for cause.

In this area of the law wide latitude is given to the discretion of the trial judge, and, absent any showing that he abused his discretion in this respect, his action must be sustained. *Commonwealth ex rel. Fletcher v. Cavell*, 395

Pa. 134, 140, 149 A. 2d 434, 437 (1959); *Commonwealth v. Pasco*, 332 Pa. 439, 445, 2 A. 2d 736, 739 (1938).

V

Appellant contends that the court abused its discretion in admitting the testimony of Daniel F. Maloney, a certified public accountant. He argues that Mr. Maloney was active politically and had clients in common with the then district attorney, Paul R. Beckert. This issue was not raised nor was this objection made in the court below. For this reason it cannot be considered by us on appeal. *Commonwealth v. Gockley*, 411 Pa. 437, 455, 192 A. 2d 693, 702 (1963).

VI

Appellant contends that the court abused its discretion in refusing to permit T. Sidney Cadwallader to testify that on one occasion appellant had signed a check in blank for Mr. Cadwallader. The record reflects that at trial Mr. Yaroschuk agreed that this was out of the order of proof. He stated that he was offering it, however, in an attempt to anticipate the district attorney's proof that appellant never did sign anything in blank. The conduct of a trial and the order of proof is a matter within the discretion of the trial judge. His actions will not be reversed in the absence of an abuse of discretion. *Commonwealth v. Burns*, 409 Pa. 619, 637, 187 A. 2d 552, 562 (1963). We find that the court acted within its discretion in ruling that Mr. Cadwallader's testimony was neither material nor relevant to the issue on the state of the record at that time.

VII

Appellant next contends that the trial judge in his charge abused his discretion in that he 1) showed prejudice against appellant by characterizing his alleged accomplice as truthful, 2) stated that there was no evidence of a deal between the alleged accomplice and the District Attorney's office, and 3) deprived appellant of his presumption of innocence by over-emphasizing the Commonwealth's evidence

and belittling appellant's evidence. We find it unnecessary to discuss each of these contentions individually. We have reviewed the lower court's charge and find that it was clear, correct and fair; it was devoid of any of the hostility or prejudice which appellant ascribes to it. The various phrases and clauses in the charge to which appellant refers in his brief, when read in the context of the charge, were not improper.

VIII

Appellant's final contention relates to his conviction for receiving stolen goods.

Appellant was convicted on the first and second counts of two indictments.[1] The first count in each indictment charged him with receiving stolen goods in the amounts of approximately $20,000 and $52,000 respectively; the second count in each indictment charged him with conspiring to embezzle these amounts.

Appellant now contends that the convictions on receiving stolen goods was improper in that the goods received were checks and did not fall within the classification of stolen goods under the Penal Code, Act of June 24, 1939, P. L. 872, § 817, as amended, § 18 P. S. § 4817. He further contends that there is no evidence that those checks which were cashed by appellant were, in fact, cashed in Bucks County. The lower court found that title company checks fully made out and properly signed were things of value and stolen goods within the meaning of the statute.

We do not believe that it is necessary to reach this question. The alleged defect in the indictment with respect to receiving stolen goods would not invalidate the conviction upon the good counts of conspiracy. "Where an indictment contains several counts, some of which are faulty, a general verdict will be sustained; one good count is sufficient to sustain a verdict." *Commonwealth v. Knox*, 172 Pa. Su-

[1] The charge of being an accessory before and after the fact was in a third indictment.

perior Ct. 510, 521-522, 94 A. 2d 128, 133 (1953); see also *Hazen v. Commonwealth*, 23 Pa. 355 (1854); *Commonwealth v. Prickett*, 132 Pa. 371, 19 A. 218 (1890); *Commonwealth v. Schoenleber*, 96 Pa. Superior Ct. 76, 85-86 (1929).

The evidence presented at the time of trial was clearly sufficient to sustain the conviction on the grounds of conspiracy alone. Moreover, the sentences were within the maximum penalty provided by law for conspiracy. Consequently, even if the receiving stolen goods counts were bad, no modification of the sentence would be required. *Commonwealth v. Knox*, supra at p. 522 and cases cited therein.

The judgments of sentence are affirmed, and it is ordered that appellant appear in the court below at such time as he may be there called, and that he be by that court committed until he has complied with his sentences or any part thereof which had not been performed at the time the order of supersedeas was entered.

WATKINS, J., files a dissenting opinion.

Dissenting Opinion by Watkins, *J.*

Filed: December 16, 1966

I would reverse the judgment of sentence and grant a new trial because the appellant was denied his constitutional right to the effective representation of counsel of his own choice.

Article I, Sec. 9 of the Constitution of the Commonwealth of Pennsylvania has been interpreted to mean that under our constitutional system, the accused, regardless of financial status, is guaranteed the right to the assistance of counsel, either counsel of his own choosing, or, if indigent or otherwise unable to secure counsel, counsel assigned by the court. Com. ex rel. Goodfellow v. Rundle, 415 Pa. 528, 204 A. 2d 446 (1964).

Article of Amendment VI of the United States Constitution clearly states that "In all criminal prosecutions, the

accused shall enjoy the right to . . . have the assistance of counsel for his defense." In U. S. v. Johnston and Balk, 318 F. 2d 288 (C. A. 6, 1963) the court held this to mean that the defendant's rights under the Sixth Amendment were not satisfied where the accused engaged counsel of his choice (Mr. Louisell) and at the time of trial Louisell asked to be excused because of other urgent business, the court granted the request since counsel's associate Mr. Barris was present and would represent the accused and was familiar with the case. The accused insisted he wanted Mr. Louisell. Trial was held two days later resulting in a conviction.

Though it was found that Mr. Barris did a competent job and conducted the trial in a good manner and in this respect the accused was not prejudiced, a new trial was granted.

In view of the foregoing let us look at our present situation. The appellant was charged and convicted of receiving stolen goods, conspiracy and being an accessory before and after the fact of an embezzlement and fraudulent conversion of about $72,000 by John J. Byers, an officer of Chelsea Title and Abstract Company.

The arrest was made in September 1963 and the first trial was held in May of 1964 at which time appellant was represented by counsel of his choice. After an extended trial wherein 700 pages of testimony the jury could not agree upon a verdict and was discharged.

The case was then listed for trial in September 28, 1964. Appellant appeared at this time without counsel and the case was continued until October 1964 with instructions to appellant to arrange for counsel by that time or the court would appoint counsel for him. Appellant stated he would be in a position to secure the attorney he wanted by November 8, 1964, but the court refused a continuance until that time.

The case was then listed for October 26, 1964 and on October 19, 1964 at a hearing before the court at the instance of the District Attorney, counsel was appointed for the appellant. Because of the nature of the case appointed counsel stated he did not have sufficient time to prepare for

trial and quite candidly stated he was unable to adequately represent appellant, and requested a continuance, which was again refused.

All through these proceedings appellant reiterated that he would be able to secure and pay counsel of his choice, being the same one who had represented him over a long period of time and at the first trial, if granted a continuance until November 10, 1964. Such a continuance was reasonable and would in no way prejudice the Commonwealth. It would have afforded appellant the constitutional right to which he was entitled.

A careful examination of this record indicates that the District Attorney seemed inordinately anxious to try this case before leaving office at the end of the year. The Judge, too, seemed greatly influenced by the attitude of the district attorney, so much so that the refusal of this reasonable continuance for the purpose of having the advice of counsel of his own choosing was a clear abuse of discretion.

The case was called at the first session of court subsequent to the mistrial. It is most surprising, at this time, when courts are leaning over backwards to protect the constitutional rights of chronic and hardened defendants, to deny a reasonable continuance for the purpose of securing counsel of his own choosing in his first brush with the law. There seems no doubt of his prior good reputation.

IN THE
SUPREME COURT OF PENNSYLVANIA

No. 142-A Misc. Docket No. 15

No. 764/5/6 October Term, 1965

COMMONWEALTH OF PENNSYLVANIA

vs.

JACK WARNER, *Appellant*

Petition for Allowance of Appeal
from the Superior Court

"May 3, 1967

Petition Denied

Per Curiam"

IN THE
SUPREME COURT OF PENNSYLVANIA

No. 142-A Misc. Docket No. 15

No. 764/5/6 October Term, 1965

COMMONWEALTH OF PENNSYLVANIA

vs.

JACK WARNER, *Appellant*

Petition for Reconsideration of Allowance of Appeal from the Superior Court

"June 23, 1967

Petition Denied

Per Curiam"

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 15788

UNITED STATES OF AMERICA

v.

CHARLES SHERMAN, a/k/a "SHIKE",
Appellant

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

Argued January 17, 1967
Before: HASTIE, GANEY and SEITZ, *Circuit Judges.*

OPINION OF THE COURT

(Filed January 30, 1967)

PER CURIAM:

This appeal from a federal conviction and sentence on a charge of theft of a carton of goods from an airline terminal presents a claim that the defendant's right to the benefit of counsel has been unlawfully abridged.

The accused had retained counsel long enough before trial to permit adequate preparation. On Friday, when the case was called for trial, counsel stated that he was ready for trial but was immediately engaged in trial in another court. The court then stated its unwillingness to permit the accused to remain longer on bail pending trial and proposed that the trial proceed on Monday. Counsel suggested the possibility that an associate in his office might defend the accused.

The trial began the following Monday and continued to its conclusion with a junior associate of retained counsel acting for the defense.

The record discloses no motion for a continuance and no representation that retained counsel's associate could not adequately get ready over the weekend for the presentation that retained counsel was already prepared to make. Indeed, the substitution of his junior associate was retained counsel's own suggestion.

In all of the circumstances, and particularly in the absence of any objection by counsel either to the substitution of his associate as counsel or to the trial date, we find no abridgement of the defendant's rights in the matter of representation by counsel.

The judgment will be affirmed.